

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

SEP 27 2007

COURT OF APPEALS
DIVISION TWO

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| THE STATE OF ARIZONA, |) | |
| |) | |
| Respondent, |) | 2 CA-CR 2007-0200-PR |
| |) | DEPARTMENT A |
| v. |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| ROBERT LOPEZ JARAMILLO, |) | Rule 111, Rules of |
| |) | the Supreme Court |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR10992

Honorable William J. O'Neil, Judge

REVIEW GRANTED; RELIEF DENIED

Robert L. Jaramillo

Florence
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 In 1984, pursuant to a plea agreement, petitioner Robert Jaramillo was convicted of first-degree murder of a fellow inmate. The trial court sentenced Jaramillo to life imprisonment without the possibility of parole for twenty-five years, to be served consecutively to the term he was already serving when he committed the offense. The trial court denied Jaramillo's first petition for post-conviction relief, filed pursuant to Rule 32,

Ariz. R. Crim. P., following an evidentiary hearing, and the Arizona Supreme Court granted his petition for review of that ruling but affirmed his conviction. *State v. Jaramillo*, 152 Ariz. 394, 733 P.2d 279 (1987). Jaramillo's second petition for post-conviction relief was dismissed at his request. The trial court denied Jaramillo's third petition and denied his request to file a delayed petition for review of that ruling, the challenge of which we dismissed when he nonetheless filed the petition for review. *State v. Jaramillo*, No. 2 CA-CR 99-0239-PR (memorandum decision filed Nov. 16, 1999). We then denied Jaramillo's next petition for review in which he challenged the trial court's denial of his fourth petition for post-conviction relief. *State v. Jaramillo*, No. 2 CA-CR 00-0272-PR (memorandum decision filed Dec. 7, 2000).

¶2 In this petition for review of the trial court's denial of relief on his fifth petition for post-conviction relief and the related motion for reconsideration, filed in propria persona, Jaramillo claims he is entitled to withdraw his guilty plea based on alleged newly discovered evidence that the state withheld in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). We will not disturb a trial court's decision to grant or deny post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶3 The trial court denied relief on the ground that Jaramillo's claims were precluded and denied his motion for rehearing on the ground that his arguments in that motion did "not avoid the preclusion of issues that could have been raised far earlier."

Jaramillo contends the prosecutor learned during a 1984 interview of a prison officer that the officer had witnessed his own father fatally stab his mother when he was a teenager, thus explaining the officer's "reluctan[ce] to testify [and] putting [the officer's] mental capacity and credibility into serious question." Jaramillo argues he would not have accepted the plea agreement if he had known this information about the officer at that time, information he claims the state withheld in violation of *Brady*. He claims that although he did not learn this information until his federal public defender brought it to his attention in 2005, he had "diligently sought to discover this material information by filing his formal request for discovery" before trial, an argument he seeks to support with selected portions of pretrial discovery requests and motions and his own affidavit, none of which supports a claim of due diligence on his part in regard to this issue. His mere assertion that he exercised due diligence to discover this "new" evidence does not sufficiently prove that he did so, nor does it explain why it took Jaramillo twenty-one years after he pled guilty to discover it, particularly in light of his admission that he "exercised due diligence in his attempt to discover this material fact[] prior to [the] change of plea hearing and was unsuccessful."

¶4 Because Jaramillo did not submit evidence below to show he had exercised due diligence to discover this information, or that the evidence "probably would have changed the verdict or sentence," he has not raised a colorable claim of newly discovered evidence pursuant to Rule 32.1(e), and the trial court thus correctly found his claim precluded. *See State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989). Moreover,

as we noted in one of our previous memorandum decisions in this matter, as a pleading defendant, Jaramillo waived the right to raise a pretrial *Brady* violation. *See State v. Flewellen*, 127 Ariz. 342, 345, 621 P.2d 29, 32 (1980) (pleading defendant waives all nonjurisdictional defects); *see also State v. Reed*, 121 Ariz. 547, 548, 592 P.2d 381, 382 (App. 1979) (state's failure to disclose alleged *Brady* evidence to grand jury is nonjurisdictional defect waived by defendant upon entering guilty plea).

¶5 Accordingly, although we grant the petition for review, we deny relief.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge